

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
May 6, 2008 Session

**JOE TAYLOR v. SMITH COUNTY, TENNESSEE, ACTING BY AND
THROUGH THE SMITH COUNTY ELECTION COMMISSION ET AL.**

**Appeal from the Chancery Court for Smith County
No. 7314 C.K. Smith, Chancellor**

No. M2006-02634-COA-R3-CV - Filed July 18, 2008

A candidate for a county school board lost the election by one vote. He filed an election contest and alleged that one voter voted in the election illegally. At trial, the alleged illegal voter exercised her Fifth Amendment right not to testify against herself. At the end of the plaintiff's proof, the trial court granted the defendants' motion to dismiss because the plaintiff had failed to prove a sufficient number of illegal votes to change the results. Plaintiff candidate appealed. We affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed

ANDY D. BENNETT, J., delivered the opinion of the court, in which PATRICIA J. COTTRELL, P.J., M.S., and FRANK G. CLEMENT, JR., J., joined.

Richard M. Brooks, Carthage, Tennessee, for the appellant, Joe Taylor.

Jack O. Bellar and Jamie D. Winkler, Carthage, Tennessee, for the appellee, Smith County, Tennessee; Eddie Taylor, Hartsville, Tennessee, for the appellee, Larry Wilkerson Taylor.

OPINION

This is an election contest concerning an election held on August 3, 2006, for the fourth district school board position in Smith County. Joe Taylor lost the election to Larry Wilkerson by one vote, 367 to 368. Of the 768 persons who voted in the fourth district, 735 voted in the school board contest.¹ Taylor alleged that one voter, Michelle Randolph, was not a resident of the district and, therefore, voted illegally. At the October 13, 2006 hearing, the trial court advised Randolph of her Fifth Amendment rights, which she chose to invoke. After hearing all the plaintiff's proof, the trial

¹The court takes judicial notice that there were a number of contested elections and primaries on the ballot.

court granted the defendants'² motion to dismiss because the plaintiff had failed to prove a sufficient number of illegal votes to change the results. While the trial court found that Randolph did not reside in the fourth district, it also found that the plaintiff had not proven that an illegal vote was actually cast by Randolph in the school board election. Taylor appealed, raising three issues: whether the trial court erred in not allowing the plaintiff to question Randolph even if she was going to invoke her Fifth Amendment privilege, whether the trial court became an advocate for the witness, and whether the trial court erred in granting the motion to dismiss.

Standard of Review

The trial court's findings of fact are accorded a presumption of correctness unless the evidence preponderates against them. *Reinhardt v. Neal*, 241 S.W.3d 472, 474 (Tenn. Ct. App. 2007). The review of legal issues is de novo, with no deference to the trial court's conclusions of law. *Id.*

Fifth Amendment

The Fifth Amendment to the United States Constitution states, in pertinent part, that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. The Fifth Amendment's protections against self-incrimination, however, extend beyond criminal cases. It "privileges [a person] not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings." *Minnesota v. Murphy*, 465 U.S. 420, 426 (1984) (quoting *Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973)). In *Floyd v. Prime Succession of TN*, No. E2006-01085-COA-R9-CV, 2007 WL 2297810 (Tenn. Ct. App. Aug. 13, 2007) (no Tenn. R. App. P. 11 application filed), this court examined the procedure for invoking the Fifth Amendment privilege against self-incrimination in a civil case. After a review of several federal cases, the court concluded that "the proper procedure to be utilized when the Fifth Amendment is invoked is for the question to be asked first. Then, if the Fifth Amendment privilege is invoked, the trial court is 'to determine the propriety of each refusal.'" *Id.* at *6 (quoting *North River Ins. Co. v. Stefanou*, 831 F.2d 484, 487 (4th Cir. 1987)).

Taylor claims the trial court erred in its handling of the Fifth Amendment issue and that the court's failure to allow him to ask questions of the witness precluded him from being able to take advantage of the negative inferences that can arise from the exercise of a witness's Fifth Amendment privilege in a civil matter. The procedure followed by the trial court clearly did not follow the procedure outlined in *Floyd*, which was issued after the hearing and actions challenged in this case. It was certainly proper for the chancellor to advise an unrepresented witness of the availability of the protections of the Fifth Amendment. After Randolph stated she wanted to invoke the Fifth Amendment, the chancellor stated to Taylor's counsel, Richard Brooks:

²Larry Wilkerson was also a defendant, having intervened as a party defendant.

All right. Now, I think in light of that, I'm not sure what questions you could ask her that would not be incriminating to her, because anything about her residence could be incriminating, anything about when she voted and how she voted could be incriminating, but I suppose there's something that you might ask her that would - - I don't know how it's going to be really relevant to this case, but I will not require her to answer any question about her residence, about her voting, where she voted, when she voted, how she voted, what knowledge she had or anything else. I'm not really sure that you can ask her anything that would be of any relevance to your case. I'll leave that option up to you.

After Mr. Brooks asked Randolph her name, her husband's name and how long they had been married, the transcript reveals the following:

MR. BROOKS: I would ask your Honor that the deed be shown to her. I'm going to ask her if that's her signature on that deed. Now, if you all want to object, have at it.

MR. BELLAR: I'm not objecting. I'm just trying to be fair to this witness and you're not, so that's - - I know that's incriminating, but - -

THE COURT: Wait a minute, now. I'm going to rule on it. She's already made her claim. So far, she hasn't said anything that's incriminating.

I sustain the - - I sustain her objection. She's objected to testifying based on the Fifth Amendment. I'm not going to let you ask her anymore questions. I don't think you can ask her anymore that could possibly be of any help to you.

MR. BROOKS: You may go, Ms. Randolph, if the judge releases you, and everybody else does.

THE COURT: Thank you. You can be excused. All right, next witness.

Thus, the trial court allowed Randolph to invoke the Fifth Amendment before any questions were asked and then dictated what could and could not be asked, before any questions were asked.

While we admit the chancellor was probably correct in his thinking about what questions could incriminate the witness, he did not allow each question to be asked and he did not allow the witness to invoke the privilege as to each question. However, Mr. Brooks did not object to proceeding in this manner. At one point, Mr. Brooks stated, "If she wants to invoke her rights, that's up to her." This comment does not amount to an objection. One who waives an error "is not entitled to relief on appeal." *Robertson v. Tenn. Bd. of Social Worker Certification and Licensure*, 227 S.W.3d 7, 15 (Tenn. 2007) (quoting *Grandstaff v. Hawks*, 36 S.W.3d 482, 488 (Tenn. Ct. App. 2000)); see also Tenn. R. App. P. 36(a). Therefore, the issue regarding the invocation of the Fifth Amendment was waived.

Trial Court Advocacy

The second issue raised by Taylor is whether the trial court became an advocate for the witness. Basically, he claims that the chancellor invoked Randolph's Fifth Amendment rights for her and that "[t]he witness never actually stated that she wanted to invoke the Fifth Amendment, she just went along with the Chancellor." Yet, the transcript reveals the following exchange:

THE COURT: . . . She can take the Fifth Amendment if she so chooses to not testify to any questions that could be incriminating to her if she wants to do that. Do you want to do that?

THE WITNESS: Yes.

So, Randolph did, in fact, state that she wanted to invoke the Fifth Amendment in a general way. Then, as has already been discussed, the trial court determined what questions could not be asked before they were asked.

_____ We view this issue as part of the first issue and likewise consider it waived due to the fact that no objection to this procedure was made at the hearing. *Robertson*, 227 S.W.3d at 15.

Granting of the Motion to Dismiss

The final issue raised in this matter is whether the trial court erred in granting the motion to dismiss. The Tennessee Supreme Court has stated:

_____ When a motion to dismiss is made at the close of a plaintiff's proof in a non-jury case [under Tenn. R. Civ. P. 41.02], the trial court must impartially weigh the evidence as though it were making findings of fact and conclusions of law after all the evidence has been presented. *See City of Columbia v. C.F.W. Constr. Co.*, 557 S.W.2d 734, 740 (Tenn. 1977). If a plaintiff's case has not been established by a preponderance of the evidence, then the case should be dismissed if the plaintiff has shown no right to relief on the facts found and the applicable law. *Id.*; *Atkins v. Kirkpatrick*, 823 S.W.2d 547, 552 (Tenn. Ct. App. 1991). The standard of review of a trial court's decision to grant a Rule 41.02 involuntary dismissal is governed by Rule 13(d) of the Tennessee Rules of Appellate Procedure. *Atkins*, 823 S.W.2d at 552. _____

Bldg. Materials Corp. v. Britt, 211 S.W.3d 706, 711 (Tenn. 2007) (footnote omitted).

Tennessee "courts should be appropriately reluctant to take the step of declaring an election invalid." *Forbes v. Bell*, 816 S.W.2d 716, 724 (Tenn. 1991). Our cases addressing illegal votes in election contests "presuppose that the illegal votes were actually cast in the election at issue - otherwise the illegal votes are irrelevant to the vote tally." *Skidmore v. McDougal*, No. M2007-00237-COA-R3-CV, 2008 WL 886266 *2 (Tenn. Ct. App. Apr. 1, 2008) (no Tenn. R. Civ. P. 11 application filed). The trial court specifically found that "the facts presented do not show that the alleged illegal

voter actually cast a vote in this election.” Both the administrator of elections and Randolph’s husband testified that Randolph “voted early.” Randolph’s application for early voting supports this testimony. Yet, as the trial court noted, this does not establish that she actually voted in the school board election. Taylor argues that this testimony is sufficient to show that she voted, but even if that is so, it is not enough. It must be shown that she voted in the election at issue: the race between Taylor and Wilkerson for the fourth district school board position. The fact that 768 persons voted in the fourth district that day, but only 735 voted in the school board election precludes any inference that any particular voter voted in the school board election. We concur with the trial court’s decision to grant the motion to dismiss.

_____. Costs of appeal are assessed against the appellant, Joe Taylor, for which execution may issue if necessary.

ANDY D. BENNETT, JUDGE